

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

BENNE SINGLETARY,	:
	:
Plaintiff,	:
	:
v.	:
	Civ. No. 06-315-JJF
	:
WARDEN RICK KEARNEY,	:
COL. GOSNELL, C/O WAPLES,	:
and SGT. K. BATES,	:
	:
Defendants.	:

MEMORANDUM ORDER

Plaintiff Benne Singletary ("Singletary"), an inmate at Sussex Correctional Institution ("SCI"), filed this civil rights action pursuant to 42 U.S.C. §1983. He appears pro se and on May 25, 2006, was granted in forma pauperis status pursuant to 28 U.S.C. § 1915. (D.I. 4.) The Court now proceeds to review and screen the Complaint pursuant to 28 U.S.C. § 1915 and § 1915A.

For the reasons discussed below, the claims against Warden Rick Kearney and K. Sgt. Bates are dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)(1).

I. THE COMPLAINT

Plaintiff alleges that on January 14, 2006, another inmate attacked and assaulted him with a homemade shank, resulting in serious physical injuries. Plaintiff alleges that Defendants C/O Waples ("Waples") and Col. Gosnell ("Gosnell") knew of a prior attack upon the attacker and that they were aware of the attacker's record of several incidents of violence or threats as

well as other disruptive behavior, yet failed to take steps to protect Plaintiff from harm. Plaintiff seeks compensatory and punitive damages.

II. STANDARD OF REVIEW

When a litigant proceeds in forma pauperis, 28 U.S.C. § 1915 provides for dismissal under certain circumstances. When a prisoner seeks redress from a government defendant in a civil action, 28 U.S.C. § 1915A provides for screening of the complaint by the Court. Both 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)(1) provide that the Court may dismiss a complaint, at any time, if the action is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant immune from such relief.

Pro se complaints are liberally construed in favor of the plaintiff. Haines v. Kerner, 404 U.S. 519, 520-521 (1972). The Court must "accept as true factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996) (citing Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993)). An action is frivolous if it "lacks an arguable basis either in law or in fact," Neitzke v. Williams, 490 U.S. 319, 325 (1989), and the claims "are of little or no weight, value, or importance, not worthy of serious consideration, or trivial." Deutsch v. United States, 67 F.3d 1080, 1083 (3d Cir. 1995). Additionally, a pro

se complaint can only be dismissed for failure to state a claim when "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Haines v. Kerner, 404 U.S. 519, 520-521 (1972) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

III. ANALYSIS

Plaintiff alleges he was attacked and injured by another inmate on January 14, 2006. Plaintiff alleges that Defendants Waples and Gosnell were aware that he was at risk to be assaulted by another inmate, but failed to protect him from harm. Also named as defendants are Warden Rick Kearney ("Warden Kearney") and Sgt. K. Bates ("Bates").

To prevail on an Eighth Amendment failure to protect claim, a plaintiff is required to show that (1) he is incarcerated under conditions posing a substantial risk of serious harm (the objective element); and (2) prison officials acted with deliberate indifference, i.e., that prison officials knew of and disregarded an excessive risk to inmate health or safety (the subjective element). See Farmer v. Brennan, 511 U.S. 825, 833-34 (1994); see also Griffin v. DeRosam, 153 Fed.Appx. 851, 2005 WL 2891102 (3d Cir. 2005). A prison official cannot be found liable "unless the official knows of and disregards an excessive risk to inmate health or safety". Id. at 837. He must "both be aware of the facts from which the inference could be drawn that a

substantial risk of serious harm exists, and he must also draw the inference." Id.

The complaint does not allege that either Warden Kearney or Sgt. Bates were aware of or should have been on notice that Plaintiff was substantially at risk from attack by another inmate. Indeed, the complaint contains no allegations against these two Defendants. Therefore, Plaintiff has failed to state a claim against Warden Kearney and Sgt. Bates and the claims against them are dismissed as frivolous pursuant to 28 U.S.C. § 1915(e) (2) (b) and § 1915A(b) (1).

IV. APPOINTMENT OF COUNSEL

Plaintiff also moves for appointment of counsel. (D.I. 3.) In support of his motion he states that he is unable to afford counsel, his imprisonment greatly limits his ability to litigate, the issues in the case are complex and will require significant research and investigation, he has limited law library access, counsel will better enable him to present evidence and cross-examine witnesses, and he has made repeated efforts to obtain a lawyer. As is well-known, a pro se litigant proceeding in forma pauperis, has no constitutional or statutory right to appointed counsel. See Ray Robinson, 640 F.2d 474, 477 (3d Cir. 1981).

It is within this Court's discretion to seek representation by counsel for Plaintiff. This is done "upon a showing of special circumstances indicating the likelihood of substantial

prejudice to [Plaintiff] resulting from [Plaintiff's] probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984); accord Tabron v. Grace, 6 F.3d 147, 155 (3d Cir. 1993) (representation by counsel may be appropriate under certain circumstances, after a finding that a plaintiff's claim has arguable merit in fact and law).

Having reviewed Plaintiff's complaint, the Court finds that his allegations are not of such a complex nature that representation by counsel is warranted at this time. Accordingly, Plaintiff's motion for appointment of counsel (D.I. 3) is denied without prejudice with leave to refile, following service upon Defendants.

V. CONCLUSION

NOW THEREFORE, at Wilmington this 13 day of July, 2006, IT IS HEREBY ORDERED that:

1. The Clerk of the Court shall cause a copy of this order to be mailed to Plaintiff.
2. The motion for appointment of counsel (D.I. 3) is DENIED without prejudice with leave to refile, following service upon Defendants.
3. Plaintiff's claims against Defendant Warden Rick Kearney and Sgt. K. Bates are DISMISSED without prejudice as

frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)(1).

4. The court has identified a cognizable Eighth Amendment claim against Defendants Col. Gosnell and C/O Waples. Plaintiff is allowed to PROCEED against these two Defendants.

IT IS FURTHER ORDERED that:

1. Pursuant to Fed. R. Civ. P. 4(c)(2) and (d)(2), Plaintiff has provided to the Court **original "U.S. Marshal-285"** forms for **remaining Defendants Col. Gosnell and C/O Waples** as well as for the Attorney General of the State of Delaware, 820 N. FRENCH STREET, WILMINGTON, DELAWARE, 19801, pursuant to Del. Code Ann. tit. 10, § 3103(c). Plaintiff has also provided the Court with copies of the complaint (D.I. 2) for service upon the Defendants.

2. The United States Marshal shall forthwith serve a copy of the complaint, this order, a "Notice of Lawsuit" form, the filing fee order, and a "Return of Waiver" form upon Defendants identified in the 285 forms.

3. Within **thirty (30) days** from the date that the "Notice of Lawsuit" and "Return of Waiver" forms are sent, if an executed "Waiver of Service of Summons" form has not been received from a Defendant, the United States Marshal shall personally serve said Defendant(s) pursuant to Fed. R. Civ. P. 4(c)(2) and said Defendant(s) shall be required to bear the cost related to such

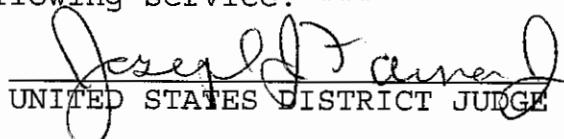
service, unless good cause is shown for failure to sign and return the waiver.

4. Pursuant to Fed. R. Civ. P. 4(d)(3), a Defendant who, before being served with process timely returns a waiver as requested, is required to answer or otherwise respond to the complaint within **sixty (60) days** from the date upon which the complaint, this order, the "Notice of Lawsuit" form, and the "Return of Waiver" form are sent. If a Defendant responds by way of a motion, said motion shall be accompanied by a brief or a memorandum of points and authorities and any supporting affidavits.

5. No communication, including pleadings, briefs, statement of position, etc., will be considered by the Court in this civil action unless the documents reflect proof of service upon the parties or their counsel.

6. **NOTE: ***** When an amended complaint is filed prior to service, the Court will **VACATE** all previous service orders entered, and service **will not take place**. An amended complaint filed prior to service shall be subject to re-screening pursuant to 28 U.S.C. §1915(e)(2) and § 1915A(a). *******

7. **NOTE: ***** Discovery motions and motions for appointment of counsel filed prior to service will be dismissed without prejudice, with leave to refile following service. *******



UNITED STATES DISTRICT JUDGE